

---

No. 9881

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

JOHN THOMAS COLE and OMEGA TRICE COLE,  
*Appellants,*

—vs.—

HOME OWNERS' LOAN CORPORATION, a corporation,  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION.

---

APPELLANT'S OPENING BRIEF

---

CARL B. LUCKERATH,

*Counsel for Appellants*

1173 Dexter-Horton Building  
Seattle, Washington

FILED

OCT - 4 1941

MARY F. O'BRIEN  
CLERK



## SUBJECT INDEX

	<i>Page</i>
Statement of Jurisdiction.....	3
Statement of the Case.....	5
Specification of errors.....	6
Argument .....	7
Summary of Argument.....	7
Point A. Appellants, as farm debtors, are entitled to the entry of a stay which will assure them of possession for three years from date of the order, regardless of any possibility of rehabilitation .....	8
Point B. The order of the District Court setting the value of the farm property of appellants at \$5250.00 was not supported by the evidence.....	11
Point C. The order of the District Court finding that there is no possibility of rehabilitation was not supported by the evidence.....	12
Conclusion .....	13
Appendix .....	15

## TABLE OF CASES CITED

	<i>Page</i>
Borchard vs. California Bank; 310 U. S. 311, 84 L. Ed. 1222 60 Sup. Ct. 957.....	8, 9, 10
John Hancock Insurance Co. vs. Bartels; 308 U. S. 180, 84 L. Ed. 176, 60 Sup. Ct. 221....	8,9,10

## TABLE OF STATUTES CITED

U. S. C. A. Title 11, Section 11 (U. S. Code, 1934 Edition, Supplement V, Title 11, Sec. 11).....	3
U. S. C. A. Title 11, Section 47 (U. S. Code 1934 Edition, Supplement V, Title 11, Section 47) .....	3
U. S. C. A. Title 11, Section 203 (U. S. Code 1934 Edition, Supplement V, Title 11. Section 203) .....	3, 5, 6, 8, 10, 15-20
U. S. C. A. Title 28, Section 41 (19) (U. S. Code 1934 Edition, Title 28, Section 41, subsec. 19).....	3
U. S. C. A. Title 28, section 225 (c) (U. S. Code 1934 Edition, Title 28, Section 225, subsec. c).....	3

## STATEMENT AS TO JURISDICTION

This is a proceeding brought by a farmer under Section 75 of the Bankruptcy act (U.S.C.A. Title 11, Sec. 203.)

(1) The statutory provisions which sustain the jurisdictions are as follows:

(a) Sustaining the Jurisdiction of the District Court: U. S. Code, 1934 Edition, Title 28, section 41, subsection (19); and U. S. Code, 1934 Edition, Supplement V, Title 11, Section 11 and 203.

(b) Sustaining the jurisdiction of the Circuit Court of Appeals: U. S. Code, 1934 Edition, Title 28, Section 225(c); and U. S. Code, 1934 Edition, Supplement V, Title 11, Sections 47 and 203.

(2) The pleading necessary to show existence of the jurisdictions are as follows, with reference to page of record in which they appear:

AMENDED DEBTOR'S PETITION, Record pages 8-10;

PETITION TO SET ASIDE EXEMPTIONS, Record pages 14-15;

PETITION (For review of orders, Record pages 20-22, and 35), Record pages 20-34;

NOTICE OF APPEAL (From Order, Record pages 49-53), Record pages 60-61.



No. 9881

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

JOHN THOMAS COLE and OMEGA TRICE COLE,  
*Appellants,*

—vs.—

HOME OWNERS' LOAN CORPORATION, a corporation,  
*Appellee.*

---

**APPELLANT'S OPENING BRIEF**

---

**STATEMENT OF THE CASE**

Appellants are engaged in farming operations in Douglas County, Washington. Appellees have a mortgage on the farm real property of appellants. Appellants filed a petition for relief as farm debtors under Section 75 of the Bankruptcy Act, USCA Title 11, Sec. 203 and, failing to secure a composition and extension under agreement with the creditors, such original proceeding was dismissed and the appellants filed a petition to be adjudged bankrupts under Section 75(s).

Thereafter appraisers appraised the real estate as having a fair and reasonable market value of \$1,000.00 and the Conciliation Commissioner ordered that the appellants should have possession of the real property for three years and should pay \$115.00 annually as

rental. Appellees petitioned the district court for review, and such review being granted over appellants' demurrer, the district court set the value of the real estate at \$5250.00, refused to set a rental value thereon, and ordered an immediate sale, under Section 75(s) (3) of the Bankruptcy act. Appellants objected to the court's order setting the value at \$5250.00 as contrary to the evidence; and the order refusing to set a rental value on the real estate, refusing to allow appellants to have possession for three years and requiring an immediate sale thereof as contrary to the provisions of Section 75(s) of the Bankruptcy act, and appeal accordingly.

#### SPECIFICATIONS OF ERRORS

- (1) Error in overruling petitioners' Demurrer to respondent's petition (for review).
- (2) That the order of the Circuit Court (record pages 49 to 53) is contrary to the laws of the United States pertaining to pleadings under the Amended Frazier-Lempke Act (11 U.S.C.A., Sec. 203; Act of June 22, 1938, Chapter 575, 75a to s; 52 Stat. 840.) providing for the relief of distressed farm debtors, and under which petitioners are seeking relief.
- (3) Failure of said order to fix an appraised value and a rental value in the manner prescribed by said

Amended Frazier-Lempke Act, and in failing to confirm petitioners' right to occupation and possession of the farm property involved for a period of three (3) years, free from legal steps of ouster or dispossession, contingent on performance of and compliance with the order of the court with respect to rental and manner of occupation.

(4) That the recitals in said order of a valuation of \$5,250.00 (Record pages 50-51) is contrary to all the evidence received, supported by no testimony whatever, as shown by the record of the trial and the opinion of the court.

(5) That there is no evidence which was introduced to support the statement contained in the portion of Paragraph I of said Order (Record pages 50 and 51) following the word "Dollars" on the first line of page 51 of the Record.

(6) That there is no support by evidence or testimony for the recital of Paragraph II of said order (page 51 of the Record).

## ARGUMENT

### SUMMARY OF ARGUMENT

POINT A. Appellants, as farm debtors, are entitled to the entry of a stay which will assure them of

possession for three years from the date of the order, regardless of any possibility of rehabilitation.

POINT B. The order of the District Court setting the value of the farm property of appellants at \$5250.00 was not supported by the evidence.

POINT C. The order of the District Court finding that there is no possibility of rehabilitation of the debtors was not supported by the evidence.

POINT A. APPELLANTS, AS FARM DEBTORS, ARE ENTITLED TO THE ENTRY OF A STAY WHICH WILL ASSURE THEM OF POSSESSION FOR THREE YEARS FROM THE DATE OF THE ORDER, REGARDLESS OF ANY POSSIBILITY OF REHABILITATION.

Section 75(s) of the Bankruptcy Act (11 U.S.C.A., Sec. 203s; Act of June 22, 1938, Chapter 575, Section 75s; 52 Stat. 840; pertinent parts of which are set out in the Appendix to this Brief) has been very clearly elucidated on this point by two cases: *John Hancock Insurance Co. vs. Bartels*, 308 U.S. 180, 84 L. Ed. 176, 60 S. Ct. 221; and *Borchard et al vs. California Bank*, 310 U.S. 311, 84 L. Ed. 1222, 60 S. Ct. 957. In each of these cases, the question being directly presented, it was held that a farm debtor, having made compliance with statutory provisions, is entitled to a stay of all proceeding against him or his property for a period of three years, and during that time the debtor may retain possession of all or part of his property subject

to the court's control, provided he pays a reasonable rental semi-annually, regardless of possibility of rehabilitation.

In the case of *Borchard vs. California Bank, supra*, the factual grounds for refusing the debtor the statutory stay of possession, were stronger than in the present case, for in that case, after the filing of the petition, the debtor was left in possession for almost three years upon stipulation before the District Court ordered the proceedings dismissed on the ground that the petitioners could not rehabilitate themselves. Such action was affirmed by the Circuit Court of Appeals. In reversing the case, the Supreme Court stated, page 317, as follows:

"No stay order has been entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to a compliance with the procedure required by the Statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the Court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens."

In *John Hancock Inc. Co. vs. Bartels, supra* (page 187) it was said:

"The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed

farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved."

This was quoted with approval in the decision in *Borchard vs. California Bank, supra* (page 317), which went on to say (page 318) :

"That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act."

The purpose of Section 75 of the Bankruptcy Act is neatly explained in *John Hancock Insurance Co. vs. Bartels, supra*, at page 184:

"The subsections of Section 75 which regulate the procedure in relation to the effort of the farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor. Nor is there anything in these subsections which warrants the imputation of a lack of good faith to a farmer-debtor because of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for other relief

afforded by subsection (s). The farmer-debtor may offer to pay what he can as Bartels did, and he is not to be charged with bad faith in taking the course which the statute expressly provides."

It is submitted that these two decisions are conclusive upon the present case.

**POINT B. THE ORDER OF THE DISTRICT COURT SETTING THE VALUE OF THE FARM PROPERTY OF APPELLANTS AT \$5250.00 WAS NOT SUPPORTED BY THE EVIDENCE.**

The Inventory and Appraisement appears on pages 17 to 19 of the Record, setting the value of the farm property of appellants at \$1000.00. The order approving said appraisal appears on page 35 of the record, order setting aside exemptions appears on pages 20 to 22 of the Record. The minutes of the hearing in the District Court, on the basis of which hearing the Memorandum opinion (Record pages 39-49) and the order complained of were made, appear on page 58 and 59 of the record. The memorandum opinion recites (Record page 40) that "it was stipulated that" a certain appraiser of the petitioner (appellee here), if personally present would testify that the fair and reasonable cash market value was at least \$5250.00. No stipulation to such effect appears in the record, though a stipulation on another matter (record page 58) was entered. Moreover the unnamed appraiser, even if

testifying, was an employee of appellee, and his testimony subject to discount. The memorandum opinion (record page 44) shows that all witnesses who actually testified set the value substantially in agreement with that set by the appraisers. The opinion states (Record page 44, tenth line from bottom) "The court believes these witnesses were in good faith . . ." That being so, it is suggested that the district court acted very arbitrarily in rejecting such evidence, given in good faith, upon what an unidentified person might have testified to, if present.

It seems strange that the court should put so much faith in the spectral testimony of a mysterious stranger, whose name appears nowhere, and who must have had seven-league boots and the eyes of Argus to do the amount of appraising stated (Record page 40).

**POINT C. THE ORDER OF THE DISTRICT COURT FINDING THAT HERE IS NO POSSIBILITY OF REHABILITATION WAS NOT SUPPORTED BY THE EVIDENCE.**

The finding referred to is on Page 51 of the Record. The only thing appearing to support this finding is in the memorandum opinion, page 46 and 47 of the record. It is submitted that those statements alone, are insufficient to support any such finding. It would seem

that, with the appellant managing other farms besides his own (page 46 of the record) that he is making an effort for rehabilitation, with a distinct possibility of success.

### CONCLUSION

It is therefore respectfully submitted that this court should reverse the decision of the District Court, with instructions to confirm the Conciliation Commissioner's Order Setting Aside Exemptions (pages 20-22 of the Record).

CARL B. LUCKERATH,

*Counsel for Appellant*



## APPENDIX

U.S.C.A. Title 11, Sec. 203 (s); U. S. Code 1934, Supplement V, Title 11, Sec. 203 (s); Act of June 22, 1938, Chapter 575, 75 (s); 52 Stat. 840:

Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are effected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such a farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever

located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions and appeals, in accordance with this title: *Provided* that in proceedings under this section, either party may file objections exceptions, and take appeals, within four months from date that the referee approves the appraisal.

(1) After the value of the debtors property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting saide, to such a debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State Law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the

direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied to their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors, from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may in addition to the rental, require payments on the principal due and owing by the debtor to the

secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semi-annually, or annually, not inconsistent with the protection of the rights of the creditors and the debtors ability to pay, with a view to his financial rehabilitation.

(3) At the end of the three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of the encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on the principal; *Provided*, that upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a re-appraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, that upon request in writing by a secured creditor or creditors,

the court shall order the property upon which said secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with five (5%) per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner appointed under subsection (2) of this section, as amended, shall continue to act, and act as referee, when the farmer-debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of, the conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35.00 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be

charged to the farmer-debtor, when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or cost of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property such receiver shall be divested of possession and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownership, or to farming corporations where at least seventy-five (75%) per centum of the stock is owned by actual farmers, and any such parties may join in one petition.